

**BEFORE THE PUBLIC SERVICE COMMISSION**  
**OF THE STATE OF DELAWARE**

IN THE MATTER OF THE SALE, RESALE,	)	
AND OTHER PROVISIONS OF INTRASTATE	)	
TELECOMMUNICATIONS SERVICES	)	
(OPENED MAY 1, 1984; REOPENED	)	PSC REGULATION DOCKET NO. 10
NOVEMBER 17, 1998; REOPENED	)	
JULY 24, 2001; AND REOPENED	)	
AUGUST 9, 2005)	)	

IN THE MATTER OF THE DEVELOPMENT OF	)	
REGULATIONS FOR THE FACILITATION OF	)	
COMPETITIVE ENTRY INTO THE TELECOM-	)	
MUNICATIONS LOCAL EXCHANGE SERVICE	)	PSC REGULATION DOCKET NO. 45
MARKET (OPENED NOVEMBER 21, 1995;	)	
REOPENED NOVEMBER 17, 1998; REOPENED	)	
JULY 24, 2001; AND REOPENED	)	
AUGUST 9, 2005)	)	

**ORDER NO. 6839**

**AND NOW**, to-wit, this 7<sup>th</sup> day of February, 2006, the Commission having received and considered the Findings and Recommendations of the Hearing Examiner previously designated in the above-captioned matters, and which Findings and Recommendations were submitted after a duly noticed public evidentiary hearing;

**AND WHEREAS**, the Hearing Examiner recommends approval of the proposed amendments to Rules 4 and 10 of the "Rules for the Provision of Telecommunications Services," upon consideration of the evidence in the record;

Now, therefore, **IT IS ORDERED:**

1. That the Commission hereby adopts and approves in its entirety the Findings and Recommendations of the Hearing Examiner, which is attached hereto as Exhibit "A."

2. That the Commission adopts the proposed amendments to Rules 4 and 10 of the "Rules for the Provision of Telecommunications Services," the exact text and citation of which are attached hereto as Exhibits "B" and "C," respectively.

3. That the Secretary shall transmit this Order, together with the exact text of the amendments to Rules 4 and 10 of the "Rules for the Provision of Telecommunications Services" to the Registrar of Regulations for publication on or before March 10, 2006.

4. That the effective date of this Order shall be the later of March 11, 2006, or ten days after the date of publication in the Register of Regulations of this Order and the final text of amendments to Rules 4 and 10 of the "Rules for the Provision of Telecommunications Services."

5. The Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae  
Chair

/s/ Jaymes B. Lester  
Commissioner

PSC Regulation Dockets Nos. 10 and 45,  
Order No. 6839 Cont'd.

/s/ Joann T. Conaway  
Commissioner

/s/ Dallas Winslow  
Commissioner

/s/ Jeffrey J. Clark  
Commissioner

ATTEST:

/s/ Karen J. Nickerson  
Secretary

E X H I B I T   "A"

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AUGUST 9, 2005)   )

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

DATED:   January 31, 2006

RUTH ANN PRICE  
HEARING EXAMINER

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**FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER**

Ruth Ann Price, duly appointed Hearing Examiner in this Docket pursuant to 26 Del. C. §502 and 29 Del. C. ch. 101, by Commission Order No. 6690, dated August 9, 2005, reports to the Commission as follows:

**I. APPEARANCES**

On behalf of the Public Service Commission Staff ("Staff"):

CONSTANCE F. MCDOWELL, CHIEF OF TECHNICAL SERVICES.

On behalf of the Division of the Public Advocate ("DPA"):

JOHN CITROLO, DEPUTY DIRECTOR.

**II. BACKGROUND**

1. By PSC Order No. 6690 (Aug. 9, 2005), the Public Service Commission (the "Commission") proposed to amend Rules 4(f) and 10 of its "Rules for the Provision of Telecommunications Services"

(initially adopted by PSC Findings, Opinion and Order No. 5833 (Nov. 6, 2001)).<sup>1</sup> The amendment to Rule 4(f), denominated as Rule 4(f)(iii), would permit telecommunications carriers to comply with their security obligations imposed by Rules 4(f)(i) and 4(f)(ii) by obtaining an irrevocable stand-by Letter of Credit. The proposed amendment to Rule 10 is designed to reduce the financial filing requirements for certain carriers who intend to issue long-term securities or debt obligations.

2. PSC Order No. 6690 further directed that the Commission Secretary forward the proposed amendments to the Delaware Registrar of Regulations for publication, which was done on September 1, 2005. Tr. 450.

3. Publication of the proposed rulemaking and evidentiary hearing was published in the form required by the Commission in *The News Journal* newspaper on August 29, 2005 and in the *Delaware State News* newspaper on August 30, 2005. Tr. 445-446, Exhs. 1 & 2.

4. Interested persons or entities had until September 30, 2005 to file comments. No comments were filed in response to this rulemaking. Tr. 448.

5. A duly noticed evidentiary hearing was conducted on October 19, 2005, in Wilmington. No members of the public attended the evidentiary hearing. Tr. 443. John Citrolo, Deputy Director, attended on behalf of the Division of the Public Advocate. The

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<sup>1</sup>On November 6, 2001, the Commission adopted its "Rules For The Provision of Competitive Intrastate Telecommunications Services" ("Rules"). Although the Rules do not apply to all telecommunications companies, they do provide a unified set of regulations applicable to most carriers providing service in the state.

record, as developed at the hearing, consists of a 13-page verbatim transcript and four exhibits.

6. I have considered all of the record evidence and, based thereon, I submit for the Commission's consideration these findings and recommendations.

### III. SUMMARY OF EVIDENCE

7. Constance S. McDowell, the Commission's Chief of Technical Services, testified regarding the need for the amendments. By way of background, Ms. McDowell testified that as Chief of Technical Services she supervises the Commission's analysts, engineers, economists, and complaint investigators. Tr. 444. She also investigates applications filed by utilities and makes recommendations to the Commissioners regarding proposed actions. Id.

8. Mrs. McDowell summarized the need for the new Rules stating that the intrastate portion of the Rules have been in effect since 1984. Tr. 446. The local exchange portion of the Rules was made effective in 1995. Id. In 2001, the current version of the Rules was approved by the Commission. Id.

9. Ms. McDowell noted that given the changing regulatory climate for telecommunications companies, the Commission's Staff found that changes were needed in the Rules allowing companies to use irrevocable Letters of Credit, rather than bonds, to guarantee customer deposits and to reduce the Staff's workload in reviewing filings for financings and the sale and acquisition of major assets. Id.



#### **IV. SUMMARY OF THE PROPOSED AMENDMENTS**

##### **A. Rule 4**

10. Rule 4 entitled "Certification" of the Commission's "Rules for the Provision of Telecommunications Services," sets forth the basic requirements for a local exchange telecommunications carrier's application for a Certificate of Public Convenience and Necessity ("CPCN"). Rule 4 provides that it is critically important for a prospective carrier to demonstrate that it has the financial viability to guarantee its service and its customer deposits and advances.

11. Staff proposes to include a new subsection under Rule 4(f), entitled "Bonds" of the Rules pertaining to certification of carriers. The new section, Rule 4(f)(iii), provides an alternate method for carriers to comply with the general \$10,000 performance bond requirement of Rule 4(f)(1) or the surety bond for deposits stated in Rule 4(f)(ii). Exh 3. Instead of providing a performance bond (Rule 4(f)(i)) or a surety bond (Rule 4(f)(ii)) to the Commission, Rule 4(f)(iii) provides that carriers may file an irrevocable stand-by Letter of Credit in the amounts stated in Rules 4(f)(i) and 4(f)(ii). Exh. 3.

12. Proposed Rule 4 (f)(iii) sets forth the requirements for an acceptable letter of credit which shall include that it must be irrevocable, issued by a Delaware bank or a confirming bank doing business in Delaware and, in cases of dispute, that Delaware law will apply. The Commission must be named as the beneficiary of the Letter of Credit and the instrument must contain language that obligates the issuer to pay a Commission-mandated monetary obligation.

13. Current Rule 4(f)(i) provides that applicants for a CPCN may post a \$10,000 performance bond, which must be renewed annually. The bonding requirement ensures that there are funds available to cover advance payments made by customers, as well as abandonment fees that are due when a carrier declares bankruptcy or abandons service. Exh. 3.

14. Rule 4(f)(ii) provides that in order to collect customer deposits or to demand any security for payment, a telecommunications carrier doing business in Delaware must file a bond with the Commission guaranteeing the payment of all deposits and advances. Submission of this bond is a condition precedent to the Commission's issuance of a CPCN.

**B. Rule 10**

15. Staff also proposes to amend Rule 10, "Reports to the Commission," which sets forth the obligations of intrastate carriers to file annual and periodic reports with the Commission. In general, all intrastate carriers must file an annual report with the Commission. Exh. 4, Rule 10(a). The Annual Report must include the customary financial information, such as a balance sheet, statement of operations, and supporting schedules. In addition, in order to give the Commission a complete picture of the carrier's financial status, the Annual Report must include, among other things, such items as the information used by the utility to calculate its Delaware tax liability, the company's intrastate revenues, and its intrastate access and billing and collection costs for each service category. Exh. 4, Rule 10(ii), (iv) & (v).

16. Staff proposes to amend the Commission's Rule 10 by including a new section, Rule 10(e), entitled "Forebearance From Filing Applications for Approval Under 26 Del. C. § 215(a) and 215(b)." Rule 10(e) waives certain filing requirements under 26 Del. C. § 215(a) and § 215(b). Section 215 governs a public utility's ability to sell or transfer property that it uses in the performance of its public utility service. Section 215 provides that a public utility must first obtain Commission approval before it can either directly or indirectly dispose of or alienate its plant or equipment, or modify or dilute its corporate securities structure. Section 215(a) and (b) provides as follows:

**§ 215. Merger, mortgage or transfer of property; issuance of securities; assumption of obligation of another; transfer of control; exceptions.**

(a) No public utility, without having first obtained the approval of the Commission, shall:

- (1) Directly or indirectly merge or consolidate with any other person or company, or sell, lease, assign, or mortgage except by supplemental indenture in accordance with the terms of a mortgage outstanding September 1, 1949, or otherwise dispose of or encumber any essential part of its franchises, plant, equipment or other property, necessary or useful in the performance of its duty to the public; or
- (2) Issue any stocks, stock certificates, or notes, bonds or other evidences of indebtedness payable in more than 1 year from the date thereof; or
- (3) Assume any obligation or liability as guarantor, endorser, surety or otherwise in respect of any security of any other person or

corporation, payable or maturing more than 1 year after the date of such issue or assumption of liability.

- (b) No individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust or other entity, whether or not organized under the laws of this State, shall acquire control, either directly or indirectly, of any public utility doing business in this State, without having first obtained the approval of the Commission. Any such acquisition of control without such prior authorization shall be void and of no effect. As used herein the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a public utility, whether through the ownership of voting securities, by effecting a change in the composition of the board of directors, by contract or otherwise. Control shall be presumed to exist if any such individual or entity, directly or indirectly, owns 10% or more of the voting securities of the public utility. This presumption may be rebutted by a showing that such ownership does not in fact confer control.

Under Section 215, the Delaware legislature has delegated to the Commission global supervisory authority over the assets of the public utilities that it regulates to ensure that companies' managers' decisions to alienate assets or to change the capital structure are prudent and in the best interests of ratepayers.

17. Staff's proposal to modify the financial reporting requirements imposed by 26 Del. C. § 215 does not seek to abandon the filing requirements by all carriers. Pursuant to Rule 10, Staff proposes to extend forbearance from regulation under Section 215 to a discrete set of "qualifying" telecommunications carriers. See Rule

10(e). A "qualifying" carrier must hold a CPCN for at least one year, but it cannot: (1) offer or provide local exchange voice service; (2) have earned more than \$2,500,000 in annual gross intrastate revenues in the preceding year; or (3) have its principal operations' office located in Delaware.

18. Staff's proposed relaxation of the Section 215 reporting requirements does not extend to transactions involving acquisitions, mergers, consolidations, or transfers of control with nonqualified entities. Exh. 4, Rule 10 (e)(ii). Qualifying carriers must still report to the Commission under Section 215 where:

- (a) a qualified carrier and a nonqualified carrier are parties to a merger;
- (b) a qualified carrier will acquire, merge with, or consolidate with a nonqualified carrier;
- (c) a nonqualified carrier will acquire, merge with, or consolidate with a qualifying carrier; or
- (d) after the completion of the acquisition, merger, consolidation, or transfer of control, the qualifying carrier and nonqualified carriers are owned by the same corporate entity. Exh. 4, Rule 10(e)(ii).

19. The qualifying carrier is not relieved of its requirement to notify the Commission within ten (10) days of the consummation of an acquisition, merger, consolidation, or transfer of control if it changes its corporate or trade name. Exh. 4, Rule 10(e)(v).

20. All carriers, qualifying and nonqualifying, must file with the Commission their intent to abandon service. Further, all carriers created as a result of an acquisition, merger, consolidation, or transfer of control must file for a CPCN in order to provide telecommunications service in the State. Exh. 4, Rule 10(e)(vi).

21. The forbearance from filing contemplated by Staff in its proposed amendment of Rule 10 is applicable to transactions between entities that are both qualifying carriers. By definition, these carriers provide limited services and have a small presence in Delaware.

**V. FINDINGS AND RECOMMENDATIONS**

22. The Commission has the authority and jurisdiction to promulgate and amend regulations under 26 Del. C. § 209(a) and 29 Del. C. § 10111 et seq. Pursuant to 26 Del. C. § 209(a), the Commission may fix "just and reasonable" regulations governing any public utility.

23. Further, under the Delaware Administrative Procedures Act, 29 Del. C. §§ 1011 et seq., in the interests of the public welfare, administrative agencies are authorized to promulgate regulations concerning the agency.

24. The "Telecommunication Regulatory Authorization Act of 1992," 26 Del. C. § 703(3) (2004 Supp.), authorized the Commission to modify its traditional rate of return regulatory requirements where to do so would "promote efficiency in public and private resource allocation." This legislation expresses the Delaware legislature's desire to allow the Commission to promulgate streamlined reporting

requirements so long as its regulatory supervision of utilities results in financially viable companies and in low cost and efficient service to ratepayers.

25. The amendments proposed by Staff, as outlined above, streamline certain reporting requirements and allow companies to use irrevocable Letters of Credit, rather than bonds, to guarantee customer deposits. These modifications are consistent with the changing regulatory climate for telecommunications companies and serve to reduce Staff's workload in reviewing filings for financings and asset transfers.

26. For all of the above reasons, I recommend that the Commission adopt, as just and reasonable, Staff's proposed amendments to the "Rules for the Provision of Telecommunications Services" as attached hereto as Attachment "A." A proposed form of Order implementing the above recommendation is attached hereto as Attachment "B" for the Commission's consideration.

Respectfully submitted,

/s/ Ruth Ann Price

Ruth Ann Price  
Hearing Examiner

Dated: January 31, 2006

E X H I B I T   "B"

PROPOSED AMENDMENT TO RULE 4(f) OF THE  
"RULES FOR THE PROVISION OF  
TELECOMMUNICATIONS SERVICES"

*(additional text in italics)*

Rule 4.    Certification.

. . . .

(f)    Bonds.

(i)    Performance Bonds.

All applicants must post a \$10,000 performance bond with Delaware surety and renew such bond annually.

(ii) Carriers requiring deposits, or any form of payment in advance for service.

No Carrier shall require its customers in Delaware to pay a deposit or pay or otherwise provide any security or advance as a condition of service unless that Carrier first has filed with the Commission a bond, issued by a corporate surety licensed to do business in Delaware, guaranteeing the repayment of all customer deposits and advances upon the termination of service. The bond need not be filed with the application, but no CPCN will be issued until such bond is filed with the Commission. The amount of the bond shall be the greater of: (A)



150% of the projected balance of deposits and advances at the end of three years of operation; or (B) \$50,000. If at any time the actual amount of deposits and advances held by a Carrier exceeds the bond, then the Carrier promptly shall file with the Commission a bond with surety to comply with the requirement of the preceding sentence. A Carrier may petition for waiver of the bond requirement three years from the date the certificate was issued and such waiver will be granted upon a demonstration of an adequate operating history and financial resources to insure the repayment to customers of any advance payments or deposits held.

(iii) *In order to comply with Rule 4(f)(i) or 4(f)(ii), an applicant or carrier may file an irrevocable stand-by Letter of Credit in lieu of a bond executed by a Delaware corporate surety. Such Letter of Credit shall:*

- (A) *allow a draw or demand against such Letter in the amount prescribed by Rule 4(f)(i) or 4(f)(ii);*
- (B) *be irrevocable, and not subject to modification, except upon the consent of the Commission;*

- (C) be issued by a federal or state chartered financial institution which does business in Delaware or be subject to an agreement with a confirming bank doing business in Delaware that such confirming bank will honor drafts or demands under such Letter;
- (D) be consistent with the provisions of 6 Del. C. §§ 5-101 through 5-117 and include terms that make Delaware law govern the relationship between the issuer and the Commission as beneficiary;
- (E) name the Commission as the beneficiary under such Letter; and
- (F) contain terms obligating the issuer to honor demands upon presentation of an Order, ruling, or decision from the Commission which finds, determines, or reports that the carrier is: (1) liable for a specified monetary sanction for its failure to perform an obligation imposed by the Public Utility Act, a Commission rule or regulation, or an Order of the

*Commission (Rule 4(f)(i)) or (2) is  
liable to refund an amount  
representing prepaid deposits or  
advances paid by customers of the  
carrier (Rule 4(f)(ii)).*

*The form and terms of the Letter of Credit shall  
be subject to approval by the Commission Staff.*

E X H I B I T   "C"

PROPOSED AMENDMENT TO RULE 10 OF THE  
"RULES FOR THE PROVISION OF TELECOMMUNICATIONS SERVICES"  
*(additional text in italics)*

Rule 10.   Reports to the Commission.

(a)   Annual and Periodic Reports.

All Carriers shall file with the Commission an Annual Report as described below and such other reports or information as the Commission may from time to time require to fulfill its statutory obligations. The Annual Report shall include standard financial reports (balance sheet, statement of operations, supporting schedules, etc.). This report shall also include:

- (i)   the   same   after-the-fact   information   that  
         management is provided concerning the measurement  
         of performance provided in Delaware;
- (ii)   the information used to determine Delaware income  
         tax liability;
- (iii)   financial   and   operating   information   for   the  
         smallest management unit that includes Delaware;
- (iv)   intrastate revenues (net of uncollectible) by  
         service category;
- (v)   intrastate access and billing and collection cost  
         by service category;
- (vi)   total number of customers by service category;

- (vii) total intrastate minutes of use by service category;
  - (viii) total intrastate number of calls by service category;
  - (ix) a description of service offered;
  - (x) a description of each complaint received by service category (in the form of a single Complaints Log); and
  - (xi) verification of deposits, customer advances, the bond requirement and the bond with surety, where applicable.
- (b) Accounting System.
- All Carriers shall use an accounting system in accordance with Generally Accepted Accounting Principles or such other uniform system of accounts previously approved in writing by the Chief of Technical Services of the Commission.
- (c) Attestation.
- All Carriers shall file all reports required by these Rules with a sworn statement by the person under whose direction the report was prepared, that the information provided in the report is true and correct to the best of the person's knowledge and belief.

(d) Time for Filing.

All periodic reports to be filed with this Commission must be received on or before the following due dates, unless otherwise specified herein, or unless good cause is demonstrated by the Carrier:

- (i) Annual Report: one hundred twenty (120) days after the end of the reported period; and
- (ii) Special and additional reports: as may be prescribed by the Commission unless good cause to the contrary is demonstrated.

(e) Forbearance from Filing Applications for Approval under 26 Del. C. § 215(a) and 215(b)

- (i) A qualified carrier (as defined below) need not file an application for approval of the financial and asset transactions set forth in 26 Del. C. § 215(a)(1), (a)(2), or (a)(3).
- (ii) Except in the case of transactions described below, a qualified carrier (as defined below) need not file for approval of mergers or consolidations under 26 Del. C. § 215(a)(1) or for transfers of control under 26 Del. C. § 215(b). However, if the other entity involved in such proposed transaction is a carrier certificated in this State that in the preceding year reported annual gross intrastate gross revenues of \$2,500,000, a qualifying carrier must

continue to file an appropriate application for merger or transfer or control under 26 Del. C. § 215(a)(1) or 215(b). An entity is involved in the transaction if:

- (A) it is a party to the merger agreement;
- (B) it is the entity to be acquired in the merger or transfer of control by the qualified carrier or its corporate parent;
- (C) it is the entity acquiring the qualified carrier; or
- (D) it will, as a result of the transaction, be owned by the same corporate owner as the qualified carrier.

(iii) A qualified carrier is a carrier:

- (A) that does not provide or offer local exchange and intrastate exchange access voice services;
- (B) that is currently certificated and that has held such certification for at least one year;
- (B) that had less than \$2,500,000 in annual gross intrastate revenues, as reported in the carrier's timely-filed

*Annual Gross Revenue return submitted  
under 26 Del. C. § 115(e); and*

*(C) that does not operate its network from  
a principal place of business in  
Delaware.*

*(iv) A qualified carrier shall include in its Annual  
Report under Rule 10(a), the date and nature of  
any mergers or transfers of control occurring  
during the preceding calendar year.*

*(v) If any transfer of control, merger, or other  
similar transaction shall result in the change of  
the corporate, or trade, name of the certificated  
qualified carrier, the qualified carrier must  
file, within 10 days after such transaction, a  
statement identifying the new name of the  
certificated carrier.*

*(vi) The forbearance from filings granted by Rule  
10(e)(i) and 10(e)(ii) do not relieve any carrier  
of the obligation to file for abandonment of  
service under 26 Del. C. § 203A nor does such  
forbearance remove the obligation that any new  
entity created by a merger, transfer of control,  
or other transaction obtain a Certificate of  
Public Convenience and Necessity from the  
Commission.*